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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6318

WILLIE SUMPTER,

Petitioner,

against

THE WHITE PLAINS HOUSING AUTHORITY, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Respondent
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General
of Counsel

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BRIEF OF RESPONDENT ATTORNEY GENERAL OF THE STATE OF NEW YORK IN OPPOSITION

Opinions Below

The opinion of the New York Court of Appeals is reported at 29 N.Y. 2d 420, and appears in petitioner's appendix at A. 5-9.* The opinion of the Appellate Division, Second Judicial Department, is reported at 36 App. Div. 2d 728, 320 N.Y. Supp. 2d 472 (A. 10). The opinion of the Supreme Court of the State of New York is reported at 63 Misc. 2d 654, 313 N.Y.S. 2d 133 (A. 11-13).

* References to the Appendix will be prefaced by A.

Jurisdiction

The judgment of the New York Court of Appeals was entered on January 13, 1972. The petition for writ of certiorari was filed on March 10, 1972.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

Question Presented

Does due process of law in the context of an applicant rejected for public housing, require more than specific notice of the grounds for rejection and an opportunity to rebut the evidence with the aid of counsel?

Statement of the Case

Petitioner's application for public housing was rejected by respondent White Plains Housing Authority because of his criminal record and his failure to submit certain required documents. Petitioner had an interview with a Housing Project Manager on June 30, 1969, regarding his application, and, during this interview, the Housing Project Manager informed the applicant that his criminal record would be grounds for his ineligibility. He was also informed that he had failed to produce proof of divorce from his first wife, Ruth G. Sumpter, and failed to produce the birth certificate of his third son. The Housing Project Manager told him that there would be a meeting of the Tenants' Selection Committee* on September 25, 1969, and that whatever additional information he could furnish this Committee would be considered.

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* This Committee is composed of two members of the Housing Authority, the Executive Director of the Authority, and the Tenant Relations Assistant.

On September 25, 1969, the Tenants' Selection Committee reviewed the application and made findings of fact based upon the documentation before it, including the criminal record of petitioner, and his failure to supply the information regarding his divorce from his first wife, and failure to supply the birth certificate of his third son. The Committee filed these findings in its office as required by § 156-a of the New York Public Housing Law.

On September 26, 1969, the Authority sent out its formal notice of rejection based upon the personal interview of the applicant and the findings of fact of the Tenants' Selection Committee. In a petition verified on January 23, 1970, Willie Sumpter brought an application under Article 78 of the New York Civil Practice Law and Rules.

New York Supreme Court, Westchester County, assumed, without discussion, that due process standards as to the eligibility of applicants for public housing must be the same as for tenants already living in such housing (A-12). It entered an order requiring the Housing Authority to hold a full evidentiary hearing with "verbatim minutes". In addition, it was ordered that the transcript of the minutes be submitted to the Court for further review and decision after such hearing.

This decision was unanimously reversed by New York Supreme Court, Appellate Division, Second Department, which held:

> "In our view, the administrative complications and burdens attendant upon the various housing authorities in the State preclude the rigid requirements ordered by Special Term for a 'full evidentiary hearing' in each case of rejection. Upon the oral argument of this proceeding the attorney for the *amicus curiae* New York City Housing Authority [the operations of which will be directly affected by that ruling] pointed out that at least 9,411 applications for

public housing in New York City were rejected during 1970. Nothing contained in *Matter of Williams v. White Plains Housing Authority* (62 Misc. 2d 613, aff'd 35 A.D. 2d 965) requires a contrary holding, since that case involved the eviction of a tenant already in public housing." (A-10) *Matter of Sumpter v. White Plains Housing Authority*, 36 App. Div. 2d 728, 320 N.Y.S. 2d 472 (2d Dept. 1971).

The petition was granted only to the extent that the matter was remitted to respondent Housing Authority for action consistent with § 156-a of the New York Public Housing Law.

On January 13, 1972, the Court of Appeals unanimously affirmed the decision below (A. 1-4). The Court pointed out that § 156-a of the New York Public Housing Law requires that an applicant be advised that he may be apprised of the reasons for his ineligibility at a personal interview.*

It was held that the issue on appeal was whether the petitioner was entitled to "a full evidentiary hearing" (A-6). The Court quoted from an earlier decision in *Matter of Fuller v. Urstadt*, 28 N.Y. 2d 315, 318-319, involving a tenant's right to renew a lease in a Mitchel-Lama project:

> "'Petitioners are entitled to the same treatment as other individuals who are the direct subjects of State action, namely, the assurance, implemented by the right to a hearing which need consist of no more than an opportunity to deny or explain, that the State has not acted arbitrarily or capriciously. The test is the limited one of arbitrariness and does not involve a full evidentiary hearing or the full scope review of ad-

* The Court noted that the Appellate Division had granted the petition to the extent of remitting the matter to the Housing Authority for action consistent with the notice provision in § 156-a.

ministrative quasi-judicial action which must be supported by substantial evidence [citation].'"

The Court below also referred to the substantial administrative burden which would be placed upon housing authorities if a rigid requirement for a "full evidentiary hearing" were mandated.

Rejecting petitioner's attempt to rely on *Goldberg* v. *Kelly*, 397 U.S. 254, the Court of Appeals emphasized that *Goldberg* involved termination of benefits presently received by one previously found eligible for such payments.

The Court held that it has long been settled that the procedural rights appropriate in the context of the holder of a status need not be appropriate or available to one who is denied the right in the first instance. Reference to the motor vehicle and other licensing laws was made. The Court also noted that this distinction pertains in the criminal law; for example, once a prisoner has been granted parole, he has a right to counsel at any subsequent revocation hearing, but one seeking parole in the first instance does not have a parallel right. *Menechino* v. *Oswald*, 430 F. 2d 403, 411; *Matter of Briguglio* v. *New York State Board of Parole*, 24 N.Y. 2d 21.

ARGUMENT

New York's procedure as to an applicant rejected for public housing, which provides specific notice and an opportunity to rebut the grounds for rejection with the aid of counsel, is in full accord with due process and presents no federal question for review by this Court.

Petitioner asserts that this Court should review the decision below because it concerns public housing, and must be viewed "in the context of the present housing crisis" (Pet., p. 5). However, his petition demonstrates no consti-

tutional defect in New York's procedure relating to rejected applicants for public housing.

Under § 156-a of the New York Public Housing Law, the applicant receives notice that he has been found ineligible and that he may be apprised of the reasons therefor at a personal interview at the office of the housing authority. During this subsequent interview, at which the law permits that counsel may be present,* the applicant may ask any questions which will help him to understand why he has been rejected. If he wishes to rebut the reasons presented to him, 9 New York Code of Rules and Regulations (hereinafter NYCRR), § 1627-7.3, provides for a housing authority Board of Review hearing, at which he may appear with counsel.

The nature of this hearing was recently made even more explicit in an amendment to § 1627-7.3, which provides:

> "The board shall also review appeals by applicants from any administrative ruling or finding of ineligibility for admission upon written demand of the applicant, made within thirty days after the interview granted in accordance with the provisions of section 156a of the Public Housing Law. The applicant at the time of such interview, shall be apprised of his right to a review by the board of review. Such review shall be in the form of an informal hearing at which the applicant may appear by counsel or any other qualified representative of his choice and present either orally or in writing, material relevant to said appeal."

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* The record in the Court below shows that respondent White Plains Housing Authority denied in its answer, petitioner's allegation that his attorneys were told by telephone that they could not be present at the interview with respondent's Executive Director. The regulation does not authorize any exclusion of counsel or other representative of an applicant.

In view of these requirements, petitioner's assertion that this case presents the issue of "adequate notice" (Pet., p. 5) is frivolous.* His remaining contention is that the Court below contravened applicable decisions of this Court by holding that an evidentiary hearing with witnesses is not required for rejected public housing applicants.

However, the applicable decisions of this Court have established that due process does not mandate the use of the same procedures in every context. As was held in *Cafeteria and Restaurant Workers* v. *McElroy*, 367 U.S. 886, 894 (1961):

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."

Due process in this context requires procedures which insure that the applicant fully comprehends the reasons for his rejection, and has an opportunity to rebut the charges with the aid of counsel. This is precisely what is accorded by New York law and regulation. Many other administrative determinations are made on this basis. As this Court stated in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956), in respect to adverse action taken against an applicant for a broadcasting license:

> "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open."

The informal hearing provided by public housing authorities in New York, is related to the practical necessity of processing numerous requests for housing accommoda-

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* Indeed, the Court below held that "the issue on this appeal, taken by our leave, is whether the Appellate Division was correct in rejecting Special Term's holding that petitioner was entitled to 'a full evidentiary hearing'. . . ." (A-6).

tions.* Such administrative considerations, while not decisive in determining the application of due process, are relevant as to the *form* which due process requires in a given case. *Cf. Duncan* v. *Louisiana*, 391 U.S. 145, 160 (1968); *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 465, 511 (1937); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971); *Hodgin* v. *Noland*, 435 F. 2d 859 (4th Cir. 1970); *Richardson* v. *Wright*, —— U.S. ——, 40 U.S.L.W. 4232 (1972).

Moreover, the distinction between tenants (who must receive a full adversarial hearing under New York law** prior to eviction) and rejected applicants is based not only on administrative considerations but also upon a difference in the legal nature of their interest. This distinction is supported by the other cases which differentiate a request for a new status from deprivation of a status already achieved. As the Second Circuit in *Menechino* v. *Oswald*, 430 F. 2d 403 (1970), recently held (in discussing and rejecting a claim that due process requires counsel at parole release hearings):

> "Nor is this the case where the state, in an adversary proceeding is seeking to deprive a person of liberty, property or a status *presently enjoyed*. See, e.g. *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961) (expulsion from tax-supported college); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare payments); *In re Gault*, 387 U.S. 1 (1967) (adjudication as juvenile delinquent and commitment); *In re Ruffalo*, 390 U.S. 544 (1968) (disbarment)." (Emphasis added.)

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* The New York City Housing Authority, for example, rejected at least 9,411 applications for public housing in 1970, receives approximately 90,000 applications annually, has an average backlog of 135,000 applications, and is able to provide admission to about 10,000 applicants.

** *Williams* v. *White Plains Housing Authority*, 62 Misc. 2d 613 (Sup. Ct., Westchester Co., 1970), aff'd 35 App. Div. 2d 965 (2d Dept. 1970).

Another example is the well-recognized difference between the procedural rights of a probationary employee in contrast to a permanent employee. The Court in *Tichon* v. *Harder*, 438 F. 2d 1396 (2d Cir. 1971) held in relation to a probationary caseworker employed by the Connecticut Department of Welfare:

> "... the (district) court stated that due process does not require a formal hearing and a right to appeal upon the discharge of a probationary employee, as opposed to a permanent employee. The former category of employees, having less or no reservoir of professional reputation built up through employment, possesses less of a claim to procedural rights, on the theory that interests other than continued employment at a particular job are not at stake."

In the case at bar, the Court below also made reference to licensing provisions as a further illustration:

> "To draw upon common examples, applicants for a motor vehicle license receive specific notice of their rejection (which is required as to housing applicants found ineligible pursuant to section 156-a of the Public Housing Law) but have no right to an administrative hearing on the issues (Vehicle and Traffic Law, § 501; *Matter of Nelson* v. *Kelly*, 4 A D 2d 596), such as that accorded a driver who has had his license revoked or suspended (Vehicle and Traffic Law, § 510; *Matter of English* v. *Tofany*, 32 A D 2d 878). Similarly, a liquor license cannot be canceled or revoked without a formal hearing; whereas a rejected applicant for such a license possesses no such right (9 NYCRR 52.13, 54.1 *et seq.*)."

Only one of the cases cited by petitioner herein involves an applicant for public housing whose procedural rights as to a determination of ineligibility were equated with those of tenants. See *Davis* v. *Toledo Metropolitan Housing Au-*

thority, 311 F. Supp. 795 (N.D. Ohio, 1970). The District Court gave no rationale whatever for its conclusion on this point, and it is not surprising that the Court below found it "unpersuasive" (A-9). *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968) and *Colon* v. *Tompkins Square Neighbors*, 294 F. Supp. 134 (S.D.N.Y. 1968), referred to in the petition at p. 7, relate neither to the rights of applicants *vis-a-vis* tenants, nor to the question of evidentiary hearings.

Indeed, any attempt to put the rights of public housing applicants and those of tenants on the same plane would be unrealistic. To be uprooted from the home and community where one is living, to endure the anxiety of being evicted and at the same time seeking new accommodations, is in no way comparable to an applicant's situation. The latter's dilemma may also be serious, but it is limited to the desire for a change in living quarters. It must also be pointed out that public housing is so scarce that a large percentage of applicants in most geographical areas cannot be accommodated, quite aside from the issue of undesirability.

Non-housing cases cited by petitioner all concerned plaintiffs deprived of their livelihood or sole source of income, without alternate means of practicing their professions or occupations. See *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)*; *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Hornsby* v. *Allen*, 326 F. 2d 605, reh. den. 330 F. 2d 55 (2d Cir. 1964); *Barnett* v. *Lindsay*, 319 F. Supp. 610 (D. Utah, 1970). Moreover, many of the cases mentioned in petitioner's brief discussed an applicant's right to appropriate constitutional protections but did *not* mandate an evidentiary hearing for such applicants. See e.g. *Homer* v. *Richmond*, 292 F. 2d 719 (D.C.

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* As the Court below also pointed out (A-8), *Goldberg* involved termination of benefits presently received by one previously found eligible for such payments.

Cir. 1961); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926).

It should be further noted that petitioner utterly fails to demonstrate that an evidentiary hearing would have been necessary in order to make an effective rebuttal in his own case. He was rejected because he had a criminal record (certified by the City Court of White Plains, New York) which included disorderly conduct and because he had failed to submit required records to the Housing Authority.*

Although these issues and charges center entirely around documents, petitioner claims to have been harmed because he was denied a trial-type hearing (which would involve the right to confront and cross-examine witnesses relied upon by the authority). The "witness" here has a police record, and although petitioner argues (p. 3) that one assault charge was withdrawn, he does not deny his convictions for disorderly conduct and arrests for assault. Any points in rebuttal, plus affidavits attesting petitioner's character, could have been introduced at the informal hearing provided by state regulation. No formal trial or verbatim transcript would have been necessary.

The indispensable core of procedural due process in finding facts is neither an expensive transcript nor expensive cross-examination, but is the relatively easy and inexpensive process of confronting the individual with the evidence against him and listening to what he has to say.

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* Petitioner is among many families competing for a tragically limited commodity. At present, there are 1,285 applications pending for approximately 545 apartments, with a turnover of only 15 apartments per year. Thus, the Housing Authority is entrusted under State law with the grave responsibility of selection and "proper screening" of prospective tenants. *Matter of Manigo* v. *N.Y.C. Housing Authority*, 51 Misc. 2d 829, 832 (Sup. Ct. N.Y. Co. 1966). It is in this context that petitioner's rejection because of his criminal record must be viewed. At the very least, it supported the Authority's determination to award the available apartments to applicants who do not have such a history.

In summary, there is no basis in the applicable decisions of this Court, nor in petitioner's Fourteenth Amendment claims, for the issuance of a writ of certiorari to review the judgment of the New York Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, April 10, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARIA L. MARCUS
Assistant Attorney General
of Counsel

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BRIEF OF RESPONDENT WHITE PLAINS HOUSING AUTHORITY IN OPPOSITION

ALONZO J. DRUMMOND
Attorney for Respondent, White Plains Housing Authority
14 Mamaroneck Avenue
White Plains, New York 10601

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Jurisdiction

The judgment of the New York Court of Appeals was entered on January 13, 1972. The petition for writ of certiorari was filed on March 10, 1972.

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

Question Presented

Do the Housing Authority's procedures for the rejection of an applicant comply with due process requirements under the Fourteenth Amendment of the United States Constitution?

Statement of the Case

The petitioner filed his first application for admission to the Project on February 14, 1956, and the application was completed on June 13, 1956. On August 29, 1957, a letter was sent to the petitioner denying the application because the applicant was over income. The applicant left White Plains on or about May 23, 1956, and re-applied on April 1, 1968, some twelve years later. In his first application of February 14, 1956, applicant stated that the family consisted of the husband and wife, a daughter 6 months old and a daughter 3 years old. In his application of April 1, 1968, the family consisted of the husband and a different named wife than that heretofore stated in the first application. In addition to the above, there were two daughters, one 15 years old, one daughter 13 years old, and three sons age 11, 10 and 7.

The petitioner spoke to the Housing Project Manager on June 30, 1969, regarding his application, and during this interview the Housing Project Manager informed the applicant that his criminal record would be grounds for his

ineligibility, together with the fact that he failed to comply with the residency requirements; also, that he failed to produce proof of divorce from his first wife, Ruth G. Sumpter, and failed to produce a birth certificate of his third son. The Housing Project Manager told him that there would be a meeting of the Tenants' Selection Committee on September 25, 1969, and that whatever additional information he could furnish this Committee would be considered.

On September 25, 1969, the Tenants' Selection Committee reviewed the Sumpter case and made the findings of fact based upon the documentation before it, to wit, the criminal record of the petitioner, the admission in his application that he was not a resident of the City of White Plains for four consecutive years prior to the application and for his failure to supply the information regarding his divorce from the first wife, and for failure to supply the birth certificate of his third son, and filed the same in its office as required by Section 156a of the New York Public Housing Law.

A requirement list was given to the applicant when he re-applied on April 1, 1968, clearly stating the necessary information on which the Authority would make its determination.

On September 26, 1969, the Authority sent out its formal notice of rejection based upon the personal interview of the applicant and the findings of fact of the Tenants' Selection Committee. The record was totally devoid of any request or demand by the petitioner for a hearing before the Housing Authority's Board of Review pursuant to 9 N.Y.C.R.R. 1627-7.3(b), although the petitioner was represented by able counsel at all times.

The petitioner elected to avail himself of an Article 78 proceeding (C.P.L.R.) before the Supreme Court of Westchester County. The Appellate Division, Second Judicial Department, by unanimous decision, rejected the judgment

of the Supreme Court on the law and remitted the matter to the respondent Housing Authority only for action consistent with Section 156a of the Public Housing Law. In that decision the Appellate Division, Second Department, held:

> "In our view, the administrative complications and burdens attendant upon the various housing authorities in the State preclude the rigid requirements ordered by Special Term for a 'full evidentiary hearing' in each case of rejection. Upon the oral argument of this proceeding the attorney for the *amicus curiae* New York City Housing Authority [the operations of which will be directly affected by that ruling] pointed out that at least 9,411 applications for public housing in New York City were rejected during 1970. Nothing contained in *Matter of Williams* v. *White Plains Housing Authority* (62 Misc. 2d 613, aff'd 35 A.D. 2d 965) requires a contrary holding, since that case involved the eviction of a tenant already in public housing." *Matter of Sumpter* v. *White Plains Housing Authority*, 36 App. Div. 2d 728, 320 N.Y.S. 2d 472 (2d Dept. 1971).

On January 13, 1972, the New York Court of Appeals unanimously affirmed the decision below (A-1-4). The Court pointed out that Section 156a of the New York Public Housing Law requires that an applicant be advised that he may be apprised of the reasons for his ineligibility at a personal interview.

It was held that the issue on appeal was whether the petitioner was entitled to "a full evidentiary hearing" (A-6). The Court quoted from an earlier decision in *Matter of Fuller* v. *Urstadt*, 28 N.Y. 2d 315, 318-319, involving a tenant's right to renew a lease in a Mitchel-Lama project:

> " 'Petitioners are entitled to the same treatment as other individuals who are the direct subjects of State

> action, namely, the assurance, implemented by the right to a hearing which need consist of no more than an opportunity to deny or explain, that the State has not acted arbitrarily or capriciously. The test is the limited one of arbitrariness and does not involve a full evidentiary hearing or the full scope review of administrative quasi-judicial action which must be supported by substantial evidence [citation].' "

The Court below also referred to the substantial administrative burden which would be placed upon housing authorities if a rigid requirement for a "full evidentiary hearing" were mandated.

Rejecting petitioner's attempt to rely on *Goldberg* v. *Kelly*, 397 U.S. 254, the Court of Appeals emphasized that *Goldberg* involved termination of benefits presently received by one previously found eligible for such payments.

The Court held that it has long been settled that the procedural rights appropriate in the context of the holder of a status need not be appropriate or available to one who is denied the right in the first instance.

Reason for Denying the Writ

The Housing Authority's procedures for the rejection of an applicant, do comply with due process requirements under the Fourteenth Amendment of the United States Constitution.

This Court has stated: "The very nature of due process negates any concept of inflexible procedures applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). In *Escalera* v. *New York City Housing Authority*, 425 F. 2d 853, 861 (1970), the Court said that: "The minimum procedural safeguards required depend on the nature of the governmental function involved and the sub-

stance of the private interests affected by the governmental action." In the context of applicants for admission to low income housing projects, established New York State and federal due process procedures require notification of rejection, opportunity for a personal interview to learn of the reasons for rejection, and the availability of the Housing Authority's Board of Review to consider appeals by applicants who so request. In New York, these procedures are set forth in Section 156a of the Public Housing Law and in Section 1627-7.3(b) of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York (hereinafter referred to as N.Y.C. R.R.).

State and federal case law does not require a full adversarial hearing with respect to the rejection of every application for admission to low income housing. In the *Matter of Williams* v. *White Plains Housing Authority,* 35 App. Div. 2d 965 (1970) aff'd 35 A.D. 2d 965, the Court held that a tenant must receive a full adversarial hearing *prior to eviction* (emphasis added). The *Williams* case, *supra,* however, did not involve an applicant, nor did the Court's opinion in that case consider the issue. Despite petitioner's contentions, there is a clear distinction between one who resides in public housing and whose tenancy is sought to be terminated, and another who has been rejected as an applicant for such public housing. The most basic distinction is that the applicant presently has housing and seeks entrance into the low income projects; whereas, the tenant, within the meaning of *Williams,* is one whose terminated tenancy would leave him totally without housing facilities. This distinction is supported by other cases which differentiate a request for a new status, from deprivation of a status already achieved. In New York, if a civil service employee becomes subject to disciplinary charges, a formal adversarial hearing must be conducted before any action can be taken against him; however, a person who is not appointed to such a position

is not entitled to notice or an adversarial hearing. Similarly, a liquor license cannot be canceled or revoked without formal hearing; whereas a rejected applicant for renewal of such a license is not entitled to any formal hearing. In *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 205 (1956), this Court held that a rejected applicant for a broadcasting license was not, *ipso facto*, entitled to a hearing.

Several recent decisions concerning due process requirements are clearly distinguishable from the case at bar. In *Goldberg* v. *Kelly*, 397 U.S. 268 (1970), this Court was presented with a question as to whether a state could terminate public assistance payments to a recipient without affording the opportunity for an evidentiary hearing. The Court held that a pre-termination hearing was necessary to provide the recipient with procedural due process. *Goldberg* is distinguishable from the instant case in that *Goldberg* concerns itself with termination of welfare benefits which may well represent termination of the recipient's necessaries for existence. The case at bar concerns one who has present housing and who is applying to the housing projects so as to spend less of his income on housing. A second distinction is that, at the time the *Goldberg* suit was filed, there was no requirement of prior notice or hearing before termination of financial aid; whereas, in the instant case, both Public Housing 156a and 9 N.Y.C. R.R. 1627-7.3 provide sufficient due process procedures. A third distinction, already presented, is the very basis upon which the Court in *Goldberg* actually premised its decision; this point is expressed in the opinion of Justice Brennan:

> "... The crucial factor in this context ... is that termination of aid pending resolution of a controversy of eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since the recipient lacks independent resources, his situation be-

> comes immediately desperate. His need to concentrate upon finding the means for daily subsistence in turn adversely affects his ability to seek redress from the welfare bureaucracy."

In the instant case, the petitioner, as an applicant for low income housing, does not come within the crucial factor contemplated by the Court in *Goldberg;* therefore, the full evidentiary hearing required by *Goldberg* is not required under the facts of this case. Mr. Justice Black in his dissenting opinion in *Goldberg* focused on the underlying problem of delineating due process:

> ". . . the Courts must be final interpreters of the Constitution, and this holding can provide an opportunity to slide interpereceptively in law-making. But when . . . judges use this judicial power for legislative purposes, . . . they wander out of the field of vested powers and transgress into the area Constitutionally assigned to Congress and the people. . . . It somewhat strains credibility to say that a government's promise of charity to an individual is property belonging to that individual . . ."

Another recent decision that is clearly distinguishable is *Davis* v. *Toledo Housing Authority*, 311 F. Supp. 795 (1970), where the petitioner also sought admission to public housing. That case is distinguishable from the case at bar in that the Court stated: ". . . The question of present and irreparable harm done to plaintiff in this case is by no means so clear as in the *Goldberg* case, since determination of eligibility does not automatically insure the applicant of immediate housing . . ." In *Davis, supra,* the plaintiff applicant continually demanded a hearing and the defendant Housing Authority refused to grant such a hearing. The Court granted a preliminary injunction restraining the defendant from continuing to reject the plaintiff on the question of eligibility for housing. *Davis, supra,*

differs from the instant case in that the petitioner herein never made any request for a hearing by the Housing Authority. The instant case, therefore, was not one of continual demand or request and subsequent refusal; but rather one where the applicant failed to pursue administrative relief provided by statute. The Court below expressly found this case "unpersuasive"(A-9).

The petitioner would have this Court impose a burdensome and expensive procedure upon the Housing Authorities and would seek to *needlessly* expand due process requirements to include an additional evidentiary hearing upon the rejection of every applicant. In light of existing statutory due process procedures, as set forth in Public Housing Law Section 156a and in the State's Regulation 9 N.Y.C.R.R. Section 1627-7.3(b); and in light of the absence of rulings on this particular issue, it is evident that the due process question presented in rejection of applications for low income housing, should be resolved in favor of existing procedures promulgated by the New York State Legislature. The State's legislation on this issue should not be lightly overturned or interjected with rigid requirements imposed by the Court. The notice and interview requirements as provided by Section 156a and the availability of Section 1627-7.3(b) of 9 N.Y.C.R.R. which provides for a review of appeals to the Authority Board of Review upon request, adequately fulfills procedural due process and is in accord with the latest relevant case law.

In summary, the Housing Authority's procedures comply with Due Process Clause under the Fourteenth Amendment and petitioner has failed to raise grounds that would support the issuance of a writ of certiorari to review the New York Court of Appeals' unanimous decision.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Dated: White Plains, New York, April 20, 1972.

Respectfully submitted,

ALONZO J. DRUMMOND
Attorney for Respondent, White Plains Housing Authority
14 Mamaroneck Avenue
White Plains, New York 10601